FILED
SEP 7 1993
OFFICE OF THE CLERK

No. 93-223

In The

Supreme Court of the United States

October Term, 1993

CREIGHTON E. MILLER, Administrator of the Estate of MAURICE J. MOLINE,

Petitioner,

v.

AMERICAN PRESIDENT LINES, LTD, on its own behalf and as successor in interest to AMERICAN MAIL LINES; MATSON NAVIGATION COMPANY, on its own behalf and as successor in interest to OCEANIC STEAMSHIP COMPANY; PACIFIC ATLANTIC STEAMSHIP COMPANY; ISBRANDTSEN LINES; WEST COAST SHIPPING COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD C. BINZLEY
(Counsel of Record)
THOMAS A. HEFFERNAN
HAROLD W. HENDERSON
THOMPSON, HINE and FLORY
629 Euclid Ave., Suite 1100
Cleveland, OH 44114-3070
(216) 566-5500

Attorneys for Respondents American President Lines, Ltd. and Matson Navigation Company, Inc.

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OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Does *Miles v. Apex Marine Corp.*, 489 U.S. 19 (1990), bar recovery of punitive damages in a seaman's general maritime death action for unseaworthiness, since punitive damages are not available in a death action under the Jones Act or Death on the High Seas Act.

LIST OF PARTIES/RULE 29.1 STATEMENT

Respondent American President Lines, Ltd., on its own behalf and as successor in interest to American Mail Lines, and respondent Matson Navigation Company, Inc., on its own behalf and as successor in interest to The Oceanic Steamship Company, were owners of vessels on which petitioner's decedent, Maurice J. Moline, was employed by respondents as a seaman at various times.

The parent corporation of respondent American President Lines, Ltd. is American President Companies, Ltd. The parent corporation of respondent Matson Navigation Company, Inc. is Alexander & Baldwin, Inc.

Respondents note that three additional corporations are named as respondents in the caption of the petition for certiorari but who have no further interest in this case: Pacific Atlantic Steamship Company, Isbrandtsen Lines, and West Coast Shipping Company. Following trial, the district court granted judgment notwithstanding the verdict to these three parties, and petitioner did not appeal such order to the Sixth Circuit Court of Appeals.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents American President Lines, Ltd. and Matson Navigation Company, Inc. respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

STATEMENT OF THE CASE

Maurice J. Moline filed suit in district court under the Jones Act (46 U.S.C. App. § 688) and the general maritime law doctrine of unseaworthiness to recover damages as a result of injuries allegedly caused by exposure to asbestos while he served as a seaman aboard numerous merchant vessels over a career encompassing 25 years. Named as defendants were thirteen shipowners who employed him from time to time as a seaman aboard their vessels. Following Moline's death, an administrator was substituted as plaintiff, and the complaint was amended to include wrongful death and survival claims.

In a two-phase trial, the jury found that Moline sustained an asbestos related-disease and awarded a sum of compensatory damages. A separate jury later found all defendants liable on grounds of negligence and unseaworthiness and awarded punitive damages in the amount of $50,000 against each shipowner in connection with the claim for unseaworthiness.

On appeal to the Sixth Circuit Court of Appeals, respondents American President Lines, Ltd. and Matson Navigation Company, Inc. challenged both the legal and factual grounds for the award of punitive damages. Respondents argued first that, under the rationale of *Miles v. Apex Marine Corp.*, 489 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), punitive damages are unavailable as a matter of law in an action for unseaworthiness because punitive damages are not available under the Jones Act or Death on the High Seas Act. Second, respondents argued that the evidence was insufficient to create a jury question with respect to punitive damages. The court of appeals vacated the award of punitive damages on the

first ground, extending *Miles* to the matter of punitive damages. The court never reached respondents' factual challenge to the award of punitive damages.

SUMMARY OF ARGUMENT

The petition for certiorari was filed well beyond the 90-day period required by this Court's rule and is untimely because the post-judgment document petitioner filed with the court of appeals in fact constituted only a suggestion for rehearing in banc, not a petition for rehearing. Under this Court's Rule 13.4, the suggestion for rehearing in banc did not suspend the 90-day period for filing the petition for certiorari.

The decision below, which applied *Miles v. Apex Marine Corp.* to punitive damages in a general maritime law action for unseaworthiness, does not conflict with decisions of other courts of appeal. No other court of appeals has had occasion to consider the question whether *Miles* applies to punitive damages in unseaworthiness actions. No actual conflict exists with three pre-*Miles* court of appeals decisions which supported the availability of punitive damages in unseaworthiness actions. Such pre-*Miles* cases never reached the issue decided below – whether *Miles* bars punitive damages in unseaworthiness actions, and the rationale underlying such cases has been discredited thoroughly by this Court's intervening decision in *Miles*. Nor is there a conflict between the decision below and the only decision from a state court of last resort on the issue, which also extended *Miles* to bar punitive damages in unseaworthiness actions.

Contrary to petitioner's assertion, there is not widespread disagreement among lower courts regarding *Miles'* applicability to punitive damages. At most, there is minimal disagreement among district courts, the overwhelming majority of which have extended *Miles* to punitive damages. Of course, this Court cannot devote its limited time to resolving minimal disputes among district courts. The issue is not sufficiently unsettled to warrant this Court's attention.

Finally, the court of appeals correctly applied this Court's precedents to the question of punitive damages in an unseaworthiness action. Petitioner's argument that *Miles* cannot be extended to punitive damages lacks substance. A writ of certiorari is unnecessary to review a correct application of this Court's precedent.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Petition is Untimely.

Rule 13.4 of the Rules of the Supreme Court of the United States specifies that the 90-day period for filing a petition for writ of certiorari runs from the date the judgment sought to be reviewed is rendered. Under that rule, a timely filed petition for rehearing suspends the running of the 90-day period until the petition for rehearing is denied, but a suggestion for rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of the rule. Thus, a suggestion for rehearing in banc does not stay the running of the 90-day period for filing the petition for certiorari.

The petition for certiorari was filed on August 6, 1993, some 136 days after the judgment in question was rendered on March 23, 1993. On April 6, 1993, petitioner filed a document denominated as a "Petition for Rehearing and Suggestion for Rehearing En Banc." The relief requested by petitioner was denied by the court below in an "Order" entered on May 10, 1993.[1] Despite the ambiguity regarding the nature of this document raised by its title, petitioner made it quite clear in the document that the relief sought was rehearing in banc. In this document, the only Federal Rule of Appellate Procedure cited by petitioner was Rule 35, pertaining to in banc hearings or rehearings.[2] In the text of the document, petitioner did not ask for a rehearing by the panel which rendered the decision (Rule 40, Federal Rules of Appellate Procedure). Rather, petitioner suggested "that the rehearing be held en banc." (Note 2, *supra*.) In his conclusion, petitioner reemphasized that the relief sought was rehearing in banc,[3]

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[1] Petitioner's typographic reproduction of the Order at p. A-37 of the petition implies by its caption that the order was entitled an "Order Denying Rehearing and Rehearing En Banc." However, such designation does not appear on the order itself, which is designated simply as an "Order." (Order entered May 10, 1993, 6th Cir. Docket Entry of 5/10/93.)

[2] "Plaintiff-appellee petitions this Honorable Court for a rehearing of the panel decision in this cause entered March 23, 1993. In accordance with Rule 35, Fed. R. App. P. and Rule 14 of the rules of this Court, plaintiff suggests that the rehearing be held en banc." (Petition for Rehearing and Suggestion for Rehearing En Banc, 6th Cir. Docket Entry of 4/10/93 at 1.)

[3] "An en banc hearing is warranted here because . . . [reasons stated.] Accordingly, plaintiff urges that, before publication (or later if necessary), the decision be reconsidered by the full court." (Petition for Rehearing and Suggestion for Rehearing En Banc, 6th Cir. Docket Entry of 4/10/93 at 10.)

again omitting any reference to a rehearing by the original panel.

Clearly, the post-judgment document filed by petitioner was in fact a suggestion for rehearing in banc pursuant to Rule 35, Federal Rules of Appellate Procedure. As such, the filing of that document did not suspend the running of the 90-day period for filing the petition for certiorari. The petition for certiorari is untimely and should be denied.

II. The Decision Below Does Not Conflict with Decisions of Other Courts of Appeal or State Courts of Last Resort.

A. No Actual Conflict Among the Circuits

Miles v. Apex Marine Corp., 489 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), established that the recovery in seamen's general maritime wrongful death and survival actions based upon unseaworthiness may not exceed the limits Congress has placed upon seamen's actions under the Jones Act. In the decision below, the court of appeals held that the reasoning of *Miles* compelled the conclusion that punitive damages are unavailable in a general maritime law unseaworthiness action for the death of a seaman.

The decision below does not conflict with any post-*Miles* decisions of other courts of appeal. In fact, the case below is the first, and to date the only, decision by a United States court of appeals to address the application of *Miles* to the question of whether punitive damages are

available in an action for unseaworthiness.[4] The post-*Miles* decisions of the courts of appeal are not in conflict and do not justify the issuance of a writ of certiorari.

As support for his contention that there is a conflict among the circuits, petitioner relies upon several court of appeals cases decided prior to *Miles* which he claims uphold the imposition of punitive damages in unseaworthiness actions under the general maritime law.[5] However, for several reasons, none of petitioner's pre-*Miles* cases presents an actual conflict with the decision below. First, none of petitioner's pre-*Miles* cases address the issue decided by the court below, namely, that *Miles* requires a seaman's recovery in a judicially-created general maritime law unseaworthiness action be

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[4] In a pre-*Miles* decision, the Ninth Circuit held that *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), precluded recovery of punitive damages in an unseaworthiness action for death of a seaman. *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), *cert. denied*, 493 U.S. 871 (1989). The *Bergen* court's extension of *Higginbotham* to punitive damages in general maritime law unseaworthiness actions is consistent with the Sixth Circuit's extension of *Miles* below to such actions. As this Court noted in *Miles*, "The logic of *Higginbotham* controls our decision here." *Miles*, 111 S.Ct. at 325.

[5] *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir.), *cert. denied*, 409 U.S. 982 (1972); *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981); *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989), *aff'd on other grounds sub nom. Miles v. Apex Marine Corp.*, 489 U.S. 19 (1990); *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987); *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970); *Complaint of Cambria S.S. Co.*, 505 F.2d 517 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975).

kept strictly within the limits imposed by Congress for a seaman's action under the Jones Act. Second, to the extent petitioner's pre-*Miles* cases support the imposition of punitive damages in unseaworthiness actions, the reasoning and authority of such cases have been discredited thoroughly by the intervening *Miles* decision of this Court. Third, several of the cases relied upon by petitioner were decided on other grounds and did not hold that punitive damages should be available in unseaworthiness actions.

(1) Petitioner's Pre-*Miles* Cases Do Not Reach the Issue Decided by the Court Below

In the decision below, the court of appeals reviewed in great detail the analysis employed by this Court in *Miles*, which began with an evaluation of the historical development of the judicially-created *Moragne*[6] maritime wrongful death action. The details of this new cause of action, including the damages recoverable, were to be worked out through future litigation, with federal wrongful death statutes to play an important role in this development. 989 F.2d at 1456.

The court of appeals below continued by noting that in *Miles*, this Court addressed the availability of certain nonpecuniary damages under the general maritime law by looking to the federal maritime death statutes for guidance, of which the Jones Act and DOHSA were of primary importance in the case of a seaman. 989 F.2d at

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[6] *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

1457. The court further observed that in *Miles*, this Court was especially sensitive to the limits set by Congress in the maritime death statutes, and had held that the recovery under the judicially-created general maritime death action, and any general maritime survival action, must be kept strictly within the limits imposed by Congress in the Jones Act and DOHSA. 989 F.2d at 1457.

The court of appeals then applied the *Miles* analysis to the question of punitive damages in a seaman's general maritime death action for unseaworthiness. As directed by *Miles*, the court looked primarily to the federal maritime wrongful death statutes for guidance. Finding that punitive damages are not available under the Jones Act or DOHSA, both of which limit recovery to pecuniary losses, and noting a general congressional policy disfavoring awards of punitive damages in maritime wrongful death actions, the court of appeals held that punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman. 989 F.2d at 1457-1459.

None of the pre-*Miles* cases upon which petitioner bases a purported conflict among the circuits reaches the issue decided by the court below – the limiting effect of maritime death statutes, particularly the Jones Act, upon the availability of punitive damages in a general maritime law unseaworthiness action for the wrongful death of a seaman.

Since petitioner's pre-*Miles* cases do not reach the issue decided below, such cases do not create a conflict among the circuits that would justify issuance of a writ of certiorari.

(2) The Reasoning and Authority of *Merry Shipping* Has Been Discredited By the Intervening *Miles* Decision of This Court, and Any Purported Conflict Between Such Case and the Decision Below Does Not Warrant Issuance of a Writ of Certiorari

The chief case cited by petitioner in support of his argument that punitive damages should be recoverable in an unseaworthiness action is *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981). In that case the court held that punitive damages may be recovered in an unseaworthiness action under general maritime law even if punitive damages are not available under the Jones Act. *Merry Shipping* has been followed without further analysis by several subsequent cases cited by petitioner, *e.g.*, *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987). However, the reasoning that supported the court's holding in *Merry Shipping* has been discredited thoroughly by this Court's intervening opinion in *Miles*.[7]

First, in *Merry Shipping*, the Fifth Circuit reasoned that, "unlike the Jones Act, no statutory restraints bar recovery under general maritime law." *Id.*, 650 F.2d at

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[7] Two district courts within the Fifth Circuit have concluded that, after *Miles*, the Fifth Circuit would not reach the same conclusion that it did in *Merry Shipping* regarding the availability of punitive damages in actions for unseaworthiness. *In re the Matter of Waterman S.S. Corp.*, 780 F. Supp. 1093, 1096 (E.D. La. 1992); *Haltom v. Lykes Bros. S.S. Co., Inc.*, 771 F. Supp. 179, 181 (E.D. Tex. 1991).

626. *Miles* completely repudiated such conclusion. Congress retains superior authority in matters of maritime tort law, and courts may not sanction more expansive remedies in a judicially-created cause of action than Congress has allowed by statute in such cases. *Miles, supra,* 111 S.Ct. at 323, 325-328.

Second, in *Merry Shipping,* the Fifth Circuit stated that "courts have long recognized that unlike under the Jones Act and the FELA, nonpecuniary losses are recoverable under general maritime law." *Id.,* 650 F.2d at 626 (footnote omitted). This conclusion also was rejected in *Miles,* in which this Court held that loss of society, a nonpecuniary loss that is not recoverable under the Jones Act, is not recoverable in a general maritime law action for unseaworthiness.

This Court's intervening decision in *Miles* thoroughly repudiated the reasoning underlying *Merry Shipping.* No court of appeals has held that *Merry Shipping* remains viable precedent after *Miles.* Neither *Merry Shipping* nor its progeny creates a conflict with the decision below sufficient to warrant issuance of a writ of certiorari.

(3) Several of the Purportedly Conflicting Cases Were Decided on Other Grounds and Did Not Hold That Punitive Damages Should Be Available in Unseaworthiness Actions

Several of the pre-*Miles* cases petitioner cites as being in conflict with the decision below do not even hold that punitive damages should be available in unseaworthiness actions. Rather, such cases were decided on other

grounds without reaching the question of whether punitive damages are available in such actions. Such cases thus do not conflict with the decision below.

In *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir.), *cert. denied*, 409 U.S. 982 (1972), the court affirmed the denial of punitive damages for deaths of seamen on the basis of a lack of evidence sufficient to support any elements of a traditional punitive damage analysis. The court had no occasion to consider whether punitive damages are allowable in an action for unseaworthiness, nor to consider the effect of the Jones Act limitation on recovery to pecuniary losses. The case of *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989), *aff'd on other grounds sub nom. Miles v. Apex Marine Corp.*, 489 U.S. 19 (1990), also affirmed the denial of punitive damages because of insufficient evidence to create a jury question.

The case of *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), similarly does not reach the legal issue of whether punitive damages are recoverable in an action for unseaworthiness. *Fuhrman* involved stipulated liability without any distinction made between Jones Act or general maritime claims, and punitive damages were denied on the common law principle that a corporation is not responsible for punitive damages based upon the actions of a subordinate employee unless the corporation authorized or ratified those actions. The denial of punitive damages on this ground does not constitute a holding that punitive damages are available in unseaworthiness actions.

Nor does *Complaint of Cambria S.S. Co.*, 505 F.2d 518 (6th Cir. 1974), hold that punitive damages are available

in unseaworthiness actions. The issue under consideration in that case was whether the general maritime law allowed recovery for loss to the estate itself. The discussion of punitive damages in that case at p. 523 n. 11 was *obiter dictum*. More significantly, the court's *dictum* recognized that punitive damages were not recoverable under the doctrine of unseaworthiness, quite the opposite of what petitioner suggests. *See* 505 F.2d at 523 n.11.

Thus, several of the cases which petitioner claims to be in conflict with the decision below do not even stand for the proposition for which they were cited. These cases are not in conflict with the decision below and do not warrant issuance of the writ.

B. No Conflict Between the Decision of the Court of Appeals Below and State Courts of Last Resort

Petitioner suggests that the decision below conflicts with a state court decision, *Mistich v. Pipelines, Inc.*, 609 So.2d 921 (La. App. 1992), *cert. denied sub nom. Brown & Root Inc. v. Mistich*, ___ U.S. ___, 61 U.S.L.W. 3850 (1993). However, a conflict between decisions of a state intermediate appellate court and a federal court of appeals on a matter of federal law does not warrant issuance of a writ of certiorari. *Cf.* Rule 10.1(b), Rules of the Supreme Court of the United States (writ may be granted when a "state court of last resort" has decided a federal question in a way that conflicts with the decision of a United States court of appeals).

Furthermore, the only decision of a state court of last resort to address the application of *Miles* to punitive

damages in unseaworthiness actions (which petitioner failed to cite) decided the issue in the same manner as the decision below. *Penrod Drilling Corp. v. Williams*, No. D-3430, ___ S.W.2d ___, 1993 Tex. LEXIS 74, 36 Tex. Sup. J. 1011 (Tex. Sup. Ct., June 16, 1993) (*Miles* bars recovery of punitive damages in seaman's action for unseaworthiness).

Thus, there is no conflict between the decision below and any state court of last resort. A writ of certiorari is not warranted on the basis of a purported conflict with state decisions.

III. The Issue Decided Below Is Not Sufficiently Unsettled to Warrant This Court's Intervention and Attention.

On the basis of minimal disagreement among district courts in post-*Miles* decisions, Petitioner suggests that the issue of the application of *Miles* to punitive damages in unseaworthiness actions is ripe for resolution by this Court. The issue is not nearly as unsettled as petitioner suggests. The overwhelming majority of district court cases are consistent with the decision below, holding that *Miles* precludes recovery of punitive damages in unseaworthiness actions. More importantly, this Court obviously cannot devote its limited time and resources to resolving disagreements among decisions of district courts.

Ten reported decisions of district courts extend *Miles* to bar punitive damages in unseaworthiness actions, as did the court of appeals in the decision below. *Anderson v. Texaco, Inc.*, 797 F. Supp. 531, 1993 A.M.C. 1319 (E.D. La.

1992); *In the Matter of the Petition of Cleveland Tankers, Inc.*, 791 F. Supp. 679 (E.D. Mich. 1992); *Complaint of Aleutian Enterprise, Ltd.*, 777 F. Supp. 793, 1992 A.M.C. 1415 (W.D. Wash. 1991); *Donaghey v. Ocean Drilling & Exploration Co.*, 1992 A.M.C. 528 (E.D. La. 1991); *Haltom v. Lykes Bros. S.S. Co., Inc.*, 771 F. Supp. 179, 1992 A.M.C. 1334 (E.D. Tex. 1991); *LaVoie v. Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827, 1992 A.M.C. 1493 (D. Hawaii 1992); *In the Matter of the MARDOC Asbestos Case Clusters, etc.*, 768 F. Supp. 595, 1991 A.M.C. 1610 (E.D. Mich. 1991); *Ortega v. Oceantrawl, Inc.*, 822 F. Supp. 621, 1993 A.M.C. 902 (D. Alaska 1992); *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991); *In re the Matter of Waterman S.S. Corp.*, 780 F. Supp. 1093, 1992 A.M.C. 1035 (E.D. La. 1992). An additional nine unreported decisions reach the same result.[8]

On the other hand, petitioner cited only one reported district court decision reaching a contrary result, *In re*

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[8] *Brumfield v. Zapata Gulf Marine Corp.*, 1991 U.S. Dist. LEXIS 12329 (E.D. La., Aug. 29, 1991); *Dopson v. Wilrig (U.S.A.), Inc.*, 1993 U.S. Dist. LEXIS 7548 (E.D. La. June 1, 1993); *Horsley v. Mobil Oil Corp.*, 1993 U.S. Dist. LEXIS 9156 (D.Mass. June 29, 1993); *Howard v. Atlantic Pacific Marine Corp.*, 1992 U.S. Dist. LEXIS 2474 (E.D. La., Feb. 28, 1992); *Knighton v. Tidex Marine, Inc.*, 1993 U.S. Dist. LEXIS 1752 (E.D. La., Feb. 16, 1993); *ODECO, Inc. v. Cornish*, 1991 U.S. Dist. LEXIS 10827 (E.D. La., July 22, 1991); *Rowan Companies, Inc. v. Badeaux*, 1991 U.S. Dist. LEXIS 12355 (E.D. La., Aug. 28, 1991); *Ryan v. Transworld Drilling Co.*, 1991 U.S. Dist. LEXIS 19539 (E.D. La., Dec. 20, 1991); *Stouffler v. Apex Towing Co., Inc.*, 1991 U.S. Dist. LEXIS 13636 (E.D. La., Sept. 20, 1991).

Garda Marine, Inc., 1992 A.M.C. 1307 (S.D. Fla. 1991), together with two unreported decisions.[9]

In an effort to create the illusion of greater disparity among the district court decisions, petitioner cited three additional cases that do not even involve unseaworthiness actions by seamen against their employers. *See Hannon v. Waterman S.S. Corp.*, 1991 W.L. 88012 (E.D. La., Dec. 20, 1991) (claim against manufacturer of asbestos products); *Duplantis v. Texaco, Inc.*, 771 F. Supp. 787 (E.D. La. 1991) (suit against non-employer not involving Jones Act or unseaworthiness); *CEH, Inc. v. F/V "Seafarer"*, 148 F.R.D. 469 (D.R.I. 1993) (property damage action). These cases are completely irrelevant to the issue decided by the court of appeals below.

In sum, the decision below does not conflict with post-*Miles* decisions of any other court of appeals or state court of last resort. The decision below also is consistent with the result reached in the overwhelming majority of district court cases to address the issue of the extension of *Miles* to unseaworthiness actions. The issue is not sufficiently unsettled to warrant this Court's intervention and attention.

IV. Review is Unwarranted Because The Decision Below is in Complete Accord With The Precedents of This Court.

In *Miles*, this Court reasoned that when Congress has spoken directly to a question, the courts are not free to

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[9] *Logue v. Tidewater, Inc.*, 1992 W.L. 59409 (E.D. La., Mar. 18, 1992); *Davis v. Penrod Drilling Corp.*, 1991 W.L. 264541 (E.D. La., Dec. 2, 1991).

supplement the statute so thoroughly that the statute becomes meaningless. Where Congress in the Jones Act did not authorize recovery for loss of society in a wrongful death action and did not authorize recovery of decedent's lost future earnings in a survival action, this forecloses more expansive remedies in a general maritime action. *Id.*, 111 S.Ct. at 325-328. This result follows directly from the Court's decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). *Miles, supra*, 111 S.Ct. at 325.

In the decision below, the court of appeals directly applied the foregoing precedents to the question of punitive damages in an unseaworthiness action. Finding that punitive damages are not available under the Jones Act or DOHSA, which limit recovery to pecuniary losses, and noting a general congressional policy disfavoring awards of punitive damages in maritime wrongful death actions, the court of appeals held that punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman. 989 F.2d at 1457, 1459.

Unable to avoid the clear and inescapable logic of the court of appeals' application of *Miles* to punitive damages, petitioner suggests that *Miles* cannot be applied to punitive damages because the purpose of punitive damages is different than that of compensatory damages. However, it is irrelevant that the purpose of punitive damages is to punish and deter; the governing factor is that by statute Congress has precluded recovery of such damages in cases involving seamen. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1348-1349 (9th Cir. 1987), *cert. denied*, 493 U.S. 871 (1989).

In order to further the argument that *Miles* cannot be extended to punitive damages, petitioner is forced to range far afield from the issue of the preclusive effect of the Jones Act upon punitive damages in a seaman's unseaworthiness action. The weakness of petitioner's position is betrayed by the degree he must depart from the central issue to cobble together his argument.

Petitioner refers to this Court's recent cases upholding punitive damages assessments in the face of due process challenges, *TXO Production Corp. v. Alliance Resources Corp.*, ___ U.S. ___, 61 U.S.L.W. 4766 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). Such cases contain no issue regarding the preclusive effect of a federal maritime statute upon the recovery in a judicially-created cause of action for unseaworthiness. The due process cases have no relevance to the issue at hand.

Petitioner again strays from the arena of unseaworthiness actions by referring to cases involving maintenance and cure. Congress has not regulated the recovery of maintenance and cure, as it has done in connection with seamen's injury and death actions. Additionally, petitioner incorrectly asserts that *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), dealt with the imposition of punitive damages in a seaman's action and that the decision below contravenes *Vaughn*. *Vaughn* dealt with the recovery of attorneys' fees as damages for a shipowner's refusal to pay maintenance and cure. An extension of *Miles* to punitive damages in an unseaworthiness action does no violence to this Court's holding with respect to maintenance and cure in *Vaughn*,

which involved neither punitive damages nor unseaworthiness.

Petitioner relies upon a case involving seamen's actions against a non-shipowner, *Pino v. Protection Maritime Ins. Co.*, 490 F. Supp. 277 (D. Mass. 1980) (claim that insurance company "blacklisted" seamen with prospective employers). Petitioner also relies upon a non-seaman's case involving a product liability action for deaths of naval aviators under DOHSA, *Renner v. Rockwell Int'l Corp.*, 403 F. Supp. 849 (C.D. Cal. 1975).[10] These cases clearly are irrelevant to the preclusive effect of the Jones Act upon the remedies in a seaman's unseaworthiness action.

Petitioner makes two final points in his argument which warrant a response. First, petitioner implies that the decision below did away with more than a century's worth of punitive damages law in unseaworthiness actions. On the contrary, the potential availability of punitive damages in seamen's unseaworthiness actions is a question of quite recent origin, having arisen only within about the last two decades. As late as 1980, a commentator was justified in observing, "It has generally been accepted that punitive damages are not recoverable in an unseaworthiness action." R. Dahlquist, "Punitive Damages Under the Jones Act," 6 The Maritime Lawyer 1, 5 (1980). Additionally, punitive damages never became a

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[10] Petitioner fails to note that *Renner* was vacated and remanded for further consideration in light of *Mobil Oil Corp. v. Higginbotham*, which held that DOHSA's limitation of damages to pecuniary losses forecloses recovery for non-pecuniary loss in a general maritime action; *see* 587 F.2d 1030 (9th Cir. 1978).

well-established remedy in seamen's cases. Respondents are not aware of a single reported federal decision in which punitive damages actually were awarded to a seaman and the award has withstood a challenge on appellate review.

Second, petitioner asserts that the decision below impairs uniformity of maritime law because it bars punitive damages only in actions by seamen while allowing such damages in actions by anyone other than a Jones Act seaman. However, this Court already has recognized that although uniformity is of value in maritime law, a concern for uniformity cannot override the terms of a statute. *Miles*, 111 S.Ct. at 326; *Higginbotham*, 436 U.S. at 624, 98 S.Ct. at 2014. The result reached by the court below was required with respect to seamen by the terms of the Jones Act and the Death on the High Seas Act.

This Court's focus on uniformity has been to establish a "uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law", *Miles*, 111 S.Ct. at 326, not to require uniformity for all maritime actions brought by persons of different legal status. As the court below noted, allowing punitive damages in this case would violate the principle of uniformity for all seamen's actions by creating two major inconsistencies in seamen's law. First, punitive damages would be available for some seamen's deaths occurring in territorial waters but not for deaths occurring on the high seas. Second, punitive damages would be available for seamen's deaths occurring in territorial waters due to unseaworthiness but not for those due to negligence. 989 F.2d at 1457-1458. The court

of appeals wisely avoided reintroducing such inconsistencies in maritime law applicable to seamen.

The court below correctly applied this Court's precedent in *Miles* and correctly concluded that punitive damages are unavailable in an unseaworthiness action under general maritime law because such damages are not available to a seaman under the Jones Act or DOHSA. A writ of certiorari is unwarranted to review a correct application of this Court's precedent.

CONCLUSION

The decision below correctly applies this Court's precedent in *Miles v. Apex Marine Corp.* to bar punitive damages in a seaman's general maritime law action for unseaworthiness. The decision is not in conflict with decisions of other courts of appeal or state courts of last resort. Nor is the issue sufficiently unsettled to warrant this Court's time and attention. Furthermore, the petition is untimely.

For the foregoing reasons, respondents respectfully suggest that the petition for writ of certiorari be denied.

Respectfully submitted,

RICHARD C. BINZLEY
(Counsel of Record)
THOMAS A. HEFFERNAN
HAROLD W. HENDERSON
THOMPSON, HINE and FLORY
629 Euclid Avenue
Cleveland, OH 44114-3070
(216) 566-5500

Counsel for Respondents American President Lines, Ltd., and Matson Navigation Company, Inc.

DATED: September 7, 1993